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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 391

JOSEPH BANCROFT & SONS CO.,
Petitioner,

v.

SHELLEY KNITTING MILLS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 8, 1967, petition for rehearing denied April 20, 1967.

CITATIONS TO OPINIONS BELOW

1. "Memorandum Opinion and Order" entered by the District Court December 28, 1964 (Appendix B, p. 2a)—unreported—permitting "additional evidence" and directing a "further hearing" on respondent's allegations of abuse of process in the institution and prosecution of petitioner's action previously tried and decided in petitioner's favor.[1]

[1]Action for trademark infringement, unfair competition and breach of contract, based on 15 U. S. C. 1121 and 28 U. S. C. 1338(b) was filed in 1958. Earlier decisions in the case include: decision of the

2. "Opinion and Order" entered by the District Court September 2, 1965 (Appendix B, p. 4a)—245 F. Supp. 523 (E. D. Pa. 1965)—adding findings of fact Nos. 175-177 and conclusions of law Nos. 19-21 supplementing findings 1-174 and conclusions 1-18 of the December 26, 1962 adjudication, 212 F. Supp. 715 (E. D. Pa. 1962) (R. 206a-288a). It also enjoined respondent "pending final judgment of this action" from further prosecution of two actions commenced against petitioner in 1963 charging abuse of process and conspiracy in bringing this action.[2]

3. "Opinion" and "Judgment" of the Court of Appeals entered March 8, 1967 (Appendix B, p. 11a, 20a respectively)—374 F. 2d 281 (3d Cir. 1967)—vacating not only the order enjoining respondent from prosecuting its actions against petitioner but also "the supplemental adjudication." Rehearing denied April 20, 1967 (Appendix B, p. 34a).

JURISDICTION

The judgment of the Court of Appeals, which is the subject of this petition, was entered March 8, 1967 (Appendix B, p. 20a).

A timely motion for rehearing was denied on April 20, 1967 (Appendix B, p. 34a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

District Court on motion for preliminary injunction, 175 F. Supp. 107 (E. D. Pa. 1958)—reversed on appeal, 268 F. 2d 569 (3d Cir. 1959); adjudication for petitioner, December 26, 1962, after trial on the merits, including Findings of Fact Nos. 1-174 and Conclusions of Law Nos. 1-18 and retaining jurisdiction during an accounting which is still pending, 212 F. Supp. 715 (E. D. Pa. 1962) (R. 206a-288a).

[2]On September 11, 1963 respondent commenced two actions in the Court of Common Pleas at Philadelphia County: No. 5521 in Court No. 7 against petitioner for abuse of process in instituting and prosecuting this action (by removal now C. A. 34244 in the United States District Court for the Eastern District of Pennsylvania) and No. 5522 in Court No. 1 against petitioner and others for conspiracy, an alleged overt act of which was the institution and prosecution of this action (R. 297a-309a)

QUESTIONS PRESENTED

I.

Where a defendant charges abuse of process by the plaintiff in instituting and prosecuting an action and presents evidence in support of its charges at the trial,

(a) is it legally incumbent upon the trial court in that action, while the case is still within its jurisdiction, to determine that issue before final judgment?

(b) is it proper for the trial court before final judgment while the case is still within its jurisdiction, to provide the parties with an opportunity to present further evidence and argument and to enter supplemental findings and conclusions on that issue after defendant had commenced separate actions against the plaintiff based on the same charge?

(c) does the institution of later actions by defendant, demanding trial by jury of the same charge, bar exercise of the court's duty to determine that charge and bar entry of supplemental findings and conclusions on that issue by the trial court in which the original action was heard and decided and whose process is alleged to have been abused?

II

Does the jurisdiction of the Court of Appeals pursuant to the "Interlocutory Decisions" statute, 28 U. S. C. 1292 (a) (1), extend beyond the power to reverse injunctions to include the power to vacate findings and conclusions of the District Court which are relevant to the right of plaintiff to recover on the merits of the original action in that court?

III

In an action pending before it, is a District Court prohibited by 28 U. S. C. 2283 from entering an order enjoining (*pendente lite*) the relitigation of issues of fact and law in separate conspiracy and abuse of process actions originally commenced in state courts after determination of the underlying issues in the pending action?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Seventh Amendment to the United States Constitution and Section 1292(a) (1) and Section 2283 of Title 28 of the United States Code, all of which are set forth in Appendix A hereof.

STATEMENT OF THE CASE

In 1958, petitioner filed an action against respondent seeking an injunction and damages for trademark infringement, unfair competition and breach of contract, based on 15 U. S. C. 1121 and 28 U. S. C. 1338(b). Prior to and during the trial of this action, respondent charged that petitioner had instituted and was prosecuting the action in bad faith for the purpose of destroying respondent's business (Respondent's Pre-Trial Memorandum, R. 33a; Cross-examination of Mr. Mersereau, R. 115a-116a; Post Trial Argument, R. 182a-205a). In support of this charge respondent addressed a large part of its case to an attempt to prove that petitioner had waived the trademark infringement, unfair competition and contract breaches complained of, or was estopped to assert them, because allegedly petitioner had kept respondent in business by promising a loan of $50,000, arranged for it to obtain additional credit from

respondent's supplier, offered a $100,000 advertising campaign, and then brought this action (at a time when respondent was attempting to liquidate its stock of substandard goods improperly marked with petitioner's trademark) not for its ostensible purpose, but to drive respondent out of business. (See cross-examination by respondent's trial counsel of petitioner's witnesses and employees, including Dr. Lippert and Messrs. Mersereau, Rainard and MacIntyre, R. 80a-85a, 106a-109a, 130a-147a, and 162a-168a).

After full trial, briefs and argument throughout which respondent reiterated the charge of bad faith (Post Trial Argument, R. 193a-198a), the District Court in December, 1962 gave judgment for petitioner on the merits. The Court entered specific conclusions of Law that: a) there had been no waiver by petitioner (Conclusions 4, 10 and 11, R. 284a-285a) and that b) petitioner was entitled to an accounting for all profits (Conclusion 18, R. 287a) because respondent had knowingly and intentionally infringed petitioner's trademark, was guilty of unfair competition and had breached the contract (Conclusions 12, 14, and 15, R. 285a-286a). Jurisdiction was retained pending an accounting which is still in progress (Adjudication R. 288a).

On September 11, 1963, respondent brought the actions (referred to *supra* in footnote 2) for abuse of process and conspiracy. The complaints allege essentially the same facts as those which respondent unsuccessfully sought to prove as its defense of waiver or estoppel at the trial of the instant action (Complaints R. 297a-309a).

On November 1, 1963, petitioner (in this pending action) moved the District Court for an injunction to stay the actions brought by respondent and for an order that the issues had been determined in the December 26, 1962 adjudication (Motion R. 289a-296a). In July, 1964 respond-

ent moved to add as counterclaims the allegations contained in the new complaints (Motion R. 314a-318a). A hearing on both motions was held on November 6, 1964. The District Court entered its Memorandum Opinion and Order of December 26, 1964 (Appendix B, p. 2a) allowing the parties to supplement the record by additional evidence on the issue of abuse of process and setting a date for that purpose.[3] Having been advised on February 17, 1965 that no further evidence would be offered by either party and respondent having filed a petition to vacate the Order of December 28, 1964 (Petition R. 344a-347a), the District Court on September 2, 1965 entered its Opinion and Order (Appendix B p. 4a) denying respondent's motion to vacate and setting forth in Paragraphs (2) and (3) its supplemental Findings of Fact Nos. 175-177 and Conclusions of Law Nos. 19-21, to make explicit what had been implicit in its earlier findings and conclusions. In Paragraph (4) of that Order the District Court stayed respondent's new actions.

Respondent appealed only from the injunction order of Paragraph (4).

The Court of Appeals vacated both the injunction order (Paragraph 4) and the supplemental adjudication (Paragraphs 2 and 3) (Appendix B, p. 20a). Petition for Rehearing was denied (Appendix B, p. 34a).

REASONS FOR GRANTING WRIT

I.

This Court should grant this writ to resolve the conflict between the decision of the court below that the charge of abuse of a federal court's process "constituted no affront to the dignity or authority of the court" . . . (Appendix B,

[3]The Court explained the import of that order in a colloquy with counsel on the date set for the hearing, February 2, 1965 (Transcript R. 334a-339a. See footnote 6, *infra*).

p. 18a), and the firmly established policy expressed by this Court as recently as *United States* v. *Powell,* 379 U. S. 48, 58 (1964) that "a court may not permit its process to be abused." In addition, this Court's decision in *Gumbel* v. *Pitkin,* 124 U. S. 131 (1888) and decisions relying on that case by other circuits[4] are in conflict with the holding by the Court of Appeals below, i.e. that the charge of abuse of the process of a federal court in an action pending before it which is made the subject matter of separate complaints originally filed in a state court after an interlocutory decision is "Such a claim [that] is entitled to the independent determination which [respondent] has evoked." (Appendix B, p. 18a) This Court should affirm the rule of law that a court has a *duty* to determine any allegation of abuse of its process. This Court should grant this writ to resolve these conflicts and to rule on this matter which is of vital importance to the orderly administration of justice in federal courts.

This Court should also grant this writ to resolve the conflict between the decision of the Court of Appeals below that in an action pending before a federal judge:

> "It is undesirable for a federal judge to look over his shoulder long after he has decided a case on

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[4] *Pueblo de Taos* v. *Archuleta,* 64 F. 2d 807, 813 (10th Cir. 1943):

> "A court has inherent power to determine whether its process is used for the purpose of vexation or fraud, instead of the single purpose for which it is intended—the adjudication of bona fide controversies. It is the duty of the court to prevent such abuse, and a dismissal of the cause is an appropriate way to discharge that duty [citing cases including *Gumbel*]"

Reid v. *Prentice-Hall Inc.,* 261 F. 2d 700, 701 (6th Cir. 1958):

> "The Court has inherent power, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongly done by virtue of its process [citing *Gumbel,* among others]. . . The court has inherent power to punish abuse of its process by dismissal of an action in the interest of orderly administration of justice."

> the merits and then undertake to determine whether the successful party had brought the action for an improper purpose, and this is especially so where this purpose has already been made the subject matter of separate litigation." (Appendix B, p. 17a)

and this Court's decision in *Marconi Wireless Co.* v. *United States,* 320 U. S. 1, 47-48 (1943), where this Court held that a case was not final until the conclusion of the accounting and that:

> "Hence the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. . . . It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence."

Additionally, this Court should resolve the conflict between the decision of the Court of Appeals below and Rules 52(b) and 60(b) of the Federal Rules of Civil Procedure relating to reopening a case after a judgment has been rendered. This Court alone can resolve this conflict. The District Court, in its attempt to be fair by offering the parties a chance to reopen the case, has been severely criticized by the Court of Appeals, which has established a precedent in conflict with the *Marconi* decision and Rules 52(b) and 60(b). This Court should grant this writ to resolve the conflict and to correct a manifest error which severely restricts the power of a federal court to reconsider or reopen a case prior to final judgment.

An additional reason for granting this writ is to correct the holding of the court below that:

> "In the present unusual circumstances, Shelley is entitled to maintain its separate actions in which it demanded trial by jury. Its preference to stay outside the jurisdiction of the chancellor who decided the original case against it and to submit to a state court jury its claim that the action which it had lost in the federal court constituted a malicious abuse of process, should be preserved." (Appendix B, p. 18a)

This Court should make clear that, where a District Court has ruled that issues of fact have been tried and determined at the time of its interlocutory adjudication, there is no constitutionally protected right to the retrial of these issues in separate actions subsequently filed in state courts.

II.

This Court should grant this writ to construe the extent of the jurisdiction of a Court of Appeals pursuant to 28 U. S. C. 1292(a) (1) and rule that on an appeal from a preliminary injunction the Courts of Appeals may not extend their jurisdiction to include the power to vacate findings and conclusions which are relevant to the plaintiff's right to maintain the action and to recover on the merits. This Court alone may construe the statute so as to give the Courts of Appeals a binding construction of 28 U. S. C. 1292(a) (1).

III.

This Court should grant this writ to resolve the conflict between the decision of the Court of Appeals below that:

> "In holding that the court below should have declined to interfere with the separate actions which

> Shelley originally brought in the state courts, one of which is still pending there against Bancroft and the individual defendants, we also effectuate the policy which prohibits the federal courts from lightly granting injunctions against proceedings in state courts." (Appendix B, p. 18a-19a)

and the decision of the Court of Appeals for the Second Circuit in *Sperry-Rand Corp.* v. *Rothlein,* 288 F. 2d 245, 249 (2d Cir. 1961), which held:

> "We hold, however, that under the particular circumstances of this case, the district court acted well within its equitable discretion in issuing the order irrespective of authority which may or may not exist under a statute or rule of procedure. Since, as we have held, the order is not of the type prohibited by 28 U. S. C. § 2283, the court could issue an injunction to prevent unnecessary or vexatious litigation. See Higgins v. California Prune & Apricot Growers, Inc., 2d Cir., 1922, 282 F. 550. Moreover, when as in this case, the court believes that suit is being brought elsewhere to undermine a decision already made by the court, an injunction is proper. See Helene Curtis Industries, Inc. v. Sales Affiliates, Inc., 2d Cir. 1957, 247 F. 2d 940."

The Court of Appeals below has assumed that the injunction order appealed from was of the type which falls within the prohibition of 28 U. S. C. 2283 in that it interfered with respondent's right to maintain its actions originally commenced in state courts. The Court did so without regard to the status of this case which is still pending before the very District Court whose process is alleged to have

been maliciously abused. The District Court in this case has ruled that the issues of abuse and conspiracy were tried and determined at the time of the original adjudication. The Court of Appeals below has ruled that,

> "Shelley is entitled to have this decided independently and not as an interstitial addition made long after the decision on the merits in Bancroft's action against it." (Appendix B, p. 18a).

This holding is in conflict with the policies expressed in the decisions of the Second Circuit in *Sperry-Rand, supra,* and *Helene Curtis Industries, Inc.* v. *Sales Affiliates, Inc.,* 247 F. 2d 940 (2d Cir. 1957). The latter case held, at 942:

> "we hold that the District Court has the power to enjoin the defendant's attempt to relitigate already tried issues."

and further, in commenting on the District Court's holding in the action before it that the plaintiffs should proceed in the new suit by pleading estoppel or seeking a temporary injunction in the new action, the court held, at 944-945:

> "We hold that neither common sense nor precedent relegates the plaintiffs to such small comfort after six years of lengthy and expensive litigation in this circuit."

This Court should resolve the conflict and rule that in a case such as this one the granting of an injunction pending the entry of final judgment to prevent a defendant from relitigating issues already tried and determined is not prohibited by 28 U. S. C. 2283.

Even though the decision of the Third Circuit was on the appeal of an interlocutory injunction order, that decision

should be reviewed now since the vacated findings and conclusions are fundamental to the future conduct of this case. See *United States* v. *General Motors Corp.* 323 U. S. 373, 377 (1945); *Land* v. *Dollar*, 330 U. S. 731, 734 n. 2 (1947); and *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685 n. 3 (1949).

If the Court does not now grant a writ of certiorari petitioner may lose any right to reinstate the vacated findings of fact and petitioner will, as a practical matter, be deprived of a full and explicit final adjudication on all issues involved in this action. Without the vacated findings and conclusions in a final adjudication those matters will not be available for review on any subsequent appeal in this case from a final order. Petitioner then will be subjected to two vexatious actions—one in the state courts of Pennsylvania and one in the District Court. In these two actions, because of the manner in which the Third Circuit vacated the findings of fact, petitioner may well be precluded as a practical matter from alleging *res judicata* or collateral estoppel. Petitioner may well be relegated to a *de novo* trial on issues which have already been tried before a federal judge and decided in petitioner's favor some five years previously.

ARGUMENT

I (a)

This Court stated, in *United States* v. *Powell*, 379 U. S. 48, 58 (1964) that ". . . a Court may not permit its process to be abused." That expression of long established and recognized *judicial duty* was followed by the District Court when it entered the supplemental findings and conclusions which were summarily vacated by the Court of Appeals below. The District Court concluded that there was no discretionary aspect to the exercise of its power. It did so

because it concluded that " . . . not only do we have the jurisdiction . . . it is our *judicial duty,* in an action pending before us, to investigate charges of conspiracy and malicious abuse of process in its institution and prosecution." (Appendix B, p. 8a, emphasis added).[5]

The Court of Appeals, however, ignored this line of cases and held that inasmuch as the respondent had made the charges of abuse and conspiracy the subject of complaints in state courts in which it demanded jury trial, the District Court had at most discretionary power to consider the questions and that the exercise of that power by the District Court in this case was an abuse of discretion. The District Court had found that had there been substance to either of the charges it would have been required to dismiss the cause (Appendix B, p. 6a). The Court of Appeals does not deal with that point at all.

Surely, a federal court, in an action pending before it, has a duty to investigate and determine matters involving the abuse of its process no matter from what source it becomes aware of these charges. Otherwise that court must ignore such charges and continue to deal with the case pending before it as if those charges did not exist. The District Court which heard the charges of respondent's counsel, which heard and observed the witnesses, which studied the documentary evidence and which heard the argument in support of respondent's defenses, is the court best qualified to decide whether petitioner has abused its process or has engaged in a conspiracy so to do. The holding of the Court of Appeals is to the effect that where such charges

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[5]This holding is based on such cases as *Gumbel* v. *Pitkin,* 124 U. S. 131 (1888) as the law of that case had been interpreted in decisions by the 10th Circuit in *Pueblo de Taos* v. *Archuleta,* 64 F. 2d 807, 813 (10th Cir. 1943) and by the 6th Circuit in *Reid* v. *Prentice-Hall, Inc.,* 261 F. 2d 700, 701 (6th Cir. 1958), *supra,* footnote 4.

are made the subject of a separate action they require independent determination.

This question is a matter of current and vital interest to all federal courts. The same fundamental question has also been recently presented to District Courts in Massachusetts and New York, as well as the Second Circuit Court of Appeals. *Nationwide Charters & Conventions, Inc.* v. *Garber,* 254 F. Supp. 85 (D. Mass. 1966) and *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 256 F. Supp. 55 (S. D. N. Y. 1966), rev'd. 366 F. 2d 303 (2d Cir. 1966); counterclaim dismissed 261 F. Supp. 691 (S. D. N. Y. 1966). Thus the resolution of this question has immediate importance far beyond the particular facts and parties here involved.

Review should thus be granted on a supervisory basis to correct this instance of improper judicial administration of the process of federal courts.

I (b)

Similarly this Court should grant this writ in order to affirm that a trial court has a right to reopen or reconsider the proceedings at any time before final judgment and to enter such supplemental findings and conclusions as are necessary. The Court of Appeals' decision in this case is in conflict with the decision of this Court in *Marconi Wireless Co.* v. *United States,* 320 U. S. 1 (1943). In *Marconi,* at 47-48, this Court held that a decision is not final until the conclusion of an accounting, (the accounting is pending in this action) and that until then a court may reopen or reconsider any portion of the case and hear reargument. In its decision in this case the Court of Appeals has held that having rendered its interlocutory adjudication on December 26, 1962 the federal judge should not ". . . look over his shoulder long after he had decided a case on the

merits . . ." (Appendix B, p. 17a). The sole justification for this holding is that the respondent had made its charges of abuse and conspiracy the subject matter of complaints filed in state courts.[6] This Court should grant this writ and affirm that the District Court's decision here, permitting additional evidence if the parties desired or in deciding the case upon the basis of the record already made, is in complete accord with the rule announced in the *Marconi* case. That same rule is the subject matter of Rule 52(b) and 60(b) of the Federal Rules of Civil Procedure relating to reopening of judgments. Only this Court can correct this error of the Court of Appeals which has tied the hands of the District Courts in the Third Circuit by ruling that they cannot reopen a case pending before them to consider and dispose of a matter which is relevant and material to a plaintiff's right to relief. The Court of Appeals did not

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[6]It is, of course, improper to attribute any delay in hearing or disposition of this matter to the trial judge. The petitioner's motion for the temporary injunction and for an order that the issues had been tried (R. 289a) was brought within two months after the state court actions were commenced on September 11, 1963. The respondent made a motion in July of 1964 to add as counterclaims in this action its complaints, but because of scheduling conflicts of counsel, a hearing on these motions could not be had until November 6, 1964. In December, 1964, the judge ordered a hearing at which each party was offered the opportunity to introduce additional evidence on the abuse of process and conspiracy allegations. At that time, February 2, 1965, the court explained its thinking as follows:

> "What I propose to do is to make specific findings in this case on those issues of abuse of process, bad faith, malicious abuse of process and conspiracy so to do in this court in relation to action 25092, which was before me.
>
> *"I realize I might have done that on the record which already existed.* However, I felt that some complaint might be made by one counsel or the other of want of notice of my intention so to do, or that one counsel or another may have felt that they were *deprived of due process* in some sense by being denied *an opportunity to offer additional or supplemental evidence on those scores,* and I therefore fixed the hearing for the date provided in my order of December 26." (R. 336a, emphasis added)

rule on the proposition of law upon which the District Court based its decision; i.e., that had it found either abuse of process or conspiracy it would have been required to dismiss petitioner's complaint. This Court should reaffirm its rulings in *Gumbel, supra,* and make clear that the law relied upon by the District Court as expressed in the *Pueblo* and *Reid* cases, *supra,* is binding on all federal courts.

I (c)

The Court of Appeals decision appears to rest somewhat on its conclusion that, once respondent demanded trial by jury in its new complaints filed originally in the state courts, the District Court was then powerless to consider the matter of whether its process had been abused or whether there had been conspiracy so to do. None of this Court's rulings with respect to the right to trial by jury in such cases as *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469 (1962) and *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500 (1959) would in any way require the result reached by the Court of Appeals below.

In its opinion the Court of Appeals says:

> "In the present unusual circumstances, Shelley is entitled to maintain its separate actions in which it demanded trial by jury." (Appendix B, p. 18a).

In so holding the Court of Appeals did not reach the question of whether the facts alleged in the "separate actions" had been tried. Yet the District Court makes it clear that it had considered these facts:

> "we gave serious and deliberate consideration to the question of Bancroft's motivation in bringing suit, because of our awareness of the statements of Shelley's counsel. Although we made no specific

> findings on these issues which were not among those framed at final pre-trial conference, *our adjudication in Bancroft's favor necessarily reflected our conclusion that Bancroft brought the action in good faith and with no ulterior motive.*" (Appendix B, p. 5a, emphasis added)

Thus, the District Court had clearly held that these facts had been tried and determined against respondent at the time of its original adjudication. Without dealing with that question at all and without discussing the evidence, the Court of Appeals ruled that respondent was entitled to retry those issues to a jury and that its preference to retry those facts outside the jurisdiction of the court which decided against it should be preserved. (Appendix B, p. 18a)

In effect, what the decision below stands for is that a party who has not prevailed on a particular set of facts as a defense may bring a separate action relying on the same facts and thereby preclude a District Court from ruling specifically on issues which it has "necessarily" ruled on previously, and in spite of the fact that the matter is still pending before it. This determination, if left to stand as a precedent, will seriously undermine the integrity of the judgments of the federal court system. This Court, therefore, should review and reverse the judgment of the court below.

II

This Court should exercise its supervisory powers and grant this petition to correct the erroneous action which the Court of Appeals below undertook in excess of its jurisdictional limits as set forth in 28 U. S. C. 1292(a)(1). That act was the vacating, without comment, of findings and conclusions relevant to the right of petitioner to recover

on the merits of the action still pending in the District Court.[7] Had there been no injunctive order as set forth in paragraph 4 of that decision no appeal could have been taken to the Court of Appeals and hence the findings would have stood until an appeal from the final judgment. At that time those findings could have been reviewed by the Court of Appeals against the background of the entire record. Petitioner contends that the record fully supports the findings. Indeed, the Notice of Appeal filed by respondent was specifically limited to paragraph 4 of the Order which contained the injunctive relief.[8] It is that paragraph which gave rise to the Court of Appeals' jurisdiction and which limits the exercise of that court's jurisdiction.

This Court should grant this writ to determine the scope of the jurisdiction of a Court of Appeals pursuant to 28 U. S. C. 1292(a) (1). This question has not been reached by this Court since 1940 in *Deckert* v. *Independence Corp.*, 311 U. S. 382 (1940). The statutory jurisdiction of an appellate court on an interlocutory appeal is limited to considerations of the propriety of the exercise of the District Court's discretionary power to grant or refuse a preliminary injunction. See *Appealability in Federal Courts*, 75 Harv. L. Rev. 351, 367-375 (1961). Since this situation arises

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[7] When those findings are properly reviewed their propriety must be determined by reference to Rule 52(a) which prohibits their being set aside unless they are found to be "clearly erroneous."

[8] NOTICE OF APPEAL TO COURT OF APPEALS

NOTICE is hereby given that Shelley Knitting Mills, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from that part of the Order entered in this action on September 2, 1965, as follows:

> "4. Pending final judgment in this action, Shelley Knitting Mills, Inc., its assignees or successors, are enjoined and restrained from further prosecution of or proceeding in Civil Action 34244 in this Court and in No. 5522 June Term 1963 in the Court of Common Pleas of Philadelphia County, unless this Court shall sooner otherwise order."

daily on appeals from any grant or denial of interlocutory injunctions, it is a question of fundamental importance that this Court must resolve.[9]

The Court of Appeals does not deal at all with the materiality, relevance or merits of the charges of abuse and conspiracy and yet, without comment, it vacates the findings by the District Court that no such abuse or conspiracy existed. This Court should make clear for the guidance of all of the Courts of Appeals that their jurisdiction under 28 U. S. C. 1292(a) (1) does not include the reversal of findings of fact and conclusions of law relevant to a plaintiff's right to recover on the merits of the action.

Similarly, for the reasons given above, the action of the Court of Appeals which denies the District Courts the right, as expressed in *Marconi, supra,* to reopen or reconsider the case at any time before final judgment, should be reversed.

III

This Court should grant this writ in order to dispose of the question raised by the Court of Appeals in holding

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[9]A review of the decisions shows that a litigant on appeal is faced with a guessing game as to just what parts of the case the appellate court will choose to review. Just to cite a few examples, the decision below should be contrasted with the cases of *Kontes Glass Co.* v. *Lab Glass, Inc.,* 373 F. 2d 319 (3d Cir. 1967) (an opinion by Judge Freedman decided on February 23, 1967, less than two weeks before the opinion in this case. There the Court of Appeals stated what petitioner submits is the correct scope of review i.e., that ". . . our inquiry on review is limited to the narrow question whether the court below abused its discretion." (373 F. 2d 319, 320)), *Shearman* v. *Missouri Pacific Railroad Co.,* 250 F. 2d 191 (8th Cir. 1957), *Reeve Music Co.* v. *Crest Records, Inc.,* 285 F. 2d 546 (2d Cir. 1957), *H. M. Kolbe Co.* v. *Armgus Textile Co.,* 315 F. 2d 70 (2d Cir. 1963), and *Drop Dead Co.* v. *S. C. Johnson & Son Inc.,* 326 F. 2d 87 (9th Cir. 1963). These cases reveal no single unifying principle or concept concerning the proper scope of judicial review. Some of them delve quite deeply into the merits of the case in deciding the appeal, and others espouse a doctrine of judicial restraint in reviewing no more than is necessary to resolve the propriety of the injunction.

that, in dissolving the injunction, it was following the policy of 28 U. S. C. 2283 (Appendix B, p. 18a-19a). In extending that policy so far, the Court of Appeals has precluded the District Court from preventing relitigation of relevant issues of fact and law already litigated and decided in this case against respondent and realleged in the respondent's conspiracy and abuse of process actions. This holding is in conflict with the decisions of the Second Circuit Court of Appeals in *Sperry Rand Corp.* v. *Rothlein*, 288 F. 2d 245 (2d Cir. 1961) (which was considered to be correct by the First Circuit Court of Appeals in *Commerce Oil Refining Corp.* v. *Miner*, 303 F. 2d 125, 128 (1st Cir. 1962)) and *Helene Curtis Industries, Inc.* v. *Sales Affiliates, Inc.*, 247 F. 2d 940 (2d Cir. 1957).[10]

The *Sperry Rand* case, *supra*, holds that in an action pending before it the District Court is not prohibited by 28 U. S. C. 2283 from enjoining a party from proceeding in a state court action in order to prevent unnecessary or vexatious litigation.

The Third Circuit's statement of "policy" in this regard appears to be an attempt to reinstate the law set forth in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941) which prohibited federal courts from granting injunctions against proceedings in state courts in relitigation cases. As the Revisers pointed out, the only substantial

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[10]The Second Circuit also ruled in *Helene Curtis* at 945, that:

> "Outside the patent field it is clear that" a federal court of equity has jurisdiction of a bill ancillary to an original case or proceedings in the same court . . . to secure or preserve the fruits and advantages of a judgment or decree rendered therein . . ." *Local Loan Co.* v. *Hunt* 1934, 292 U. S. 234, 239, 54 S. Ct. 695, 697, 78 L. Ed. 1230. See also *Dietzsch* v. *Huidekoper*, 1880, 103 U. S. 494, 26 L. Ed. 497. The mere separateness of the cause of action has not been considered an absolute bar to the granting of supplemental relief [citing *Dugas* v. *America Surety Co.*, 300 U. S. 414 (1937) and *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291 (1906)]."

change intended by the amendment which was enacted as § 2283 was to overrule this Court's decision in *Toucey, supra* (H. R. Rep. No. 308, 80th Cong., 1st Sess., A181-182 (1947)).[11] This legislative history was recognized in the dissenting opinion of Mr. Chief Justice Warren, with whom Mr. Justice Black and Mr. Justice Douglas concurred in *Amalgamated Clothing Workers* v. *Richmond Bros. Co.*, 348 U. S. 511, 523 (1955).

The "policy" referred to by the Court of Appeals below *is not even reached with respect to the abuse of process action since that action has been removed and is presently pending before that same District Court.* Accordingly, the propriety of the injunctive order with respect to the abuse of process action cannot be construed as raising the "policy" question involved in § 2283. What is involved is the inherent power of a District Court to control the cases on its docket. See *Kessler* v. *Eldred*, 206 U. S. 285 (1907).

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[11] As shown by several commentators, the bar is uncertain as to the applicability of § 2283 to protect or effectuate interlocutory judgments. As stated in *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1051 (1965):

> "'*To Protect or Effectuate Its Judgments.*'—The legislative history of § 2283 reveals that this phrase was inserted to enable federal courts to enjoin relitigation in state courts, and thus reestablish the pre-*Toucey* law. The courts of appeals have therefore affirmed such injunctions. It is not yet clear whether § 2283 also authorizes an injunction calculated to protect a district court's interlocutory order [citing *Sperry Rand, supra*]."

In the civil rights field, the University of Pennsylvania Law Review in *Power to Enjoin State Prosecutions Violative of Federally Protected Rights*, 114 U of Pa. L. Rev. 561, 568 (1966) observed, in discussing § 2283, that the policies expressed in the Civil Rights Act of 1964 are in conflict with the traditional policy of federal noninterference with state court proceedings. In its conclusion the editors state that:

> "All these observations evince a pressing need for resolution by the Supreme Court. . . . But whatever the resolution of the problem, the political and social implications of this issue make it imperative that either the federal injunctive power be enunciated or that its absence be made very clear." (p. 569)

It is fundamental that a District Court has the inherent power to control cases on its docket. That power has never been questioned before and has been expressly affirmed by this Court in *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379 (1935). However, the Third Circuit's opinion in this case would indicate that once the charge of abuse is made the subject of a separate suit, whether removed to the District Court or not, the District Court does not have the power to control its docket and to prevent concurrent litigation involving the same facts and the same issues which are presently before it.

The conspiracy action against petitioner and individual defendants[12] *is pending in the state court.* The injunctive order against respondent proceeding in that case does raise the "policy" question. It is that aspect of the Court of Appeals' decision that is in conflict with the "policy" statement by the Second Circuit in the *Sperry Rand* case, *supra.* It is petitioner's position that the policy expressed by § 2283 was not violated by the District Court since its order enjoined respondent from further prosecuting its State court action pending a final judgment in this action and in so doing acted in "aid of its jurisdiction" and to "protect" and "effectuate" its interlocutory judgment.

This Court should grant this writ in order that the applicability of § 2283 to a case which has been decided but which has not yet reached final judgment be clearly defined. If the exception to the general prohibition does not apply to this case, it is difficult to conceive of any case in which a federal court may enjoin a party from relitigating facts in a state court action already determined by that federal court.

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[12]Those named are petitioner's licensee company Roselon Yarns, Inc. and its president Gordon Adams as well as officers or employees of petitioner. All of the individuals were witnesses at the trial of this action and were cross-examined at great length about the matters which are alleged in respondent's complaints.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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